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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 809

UNITED STATES, PETITIONER

v.

ROBERT MORSS LOVETT

No. 810

UNITED STATES, PETITIONER

v.

GOODWIN B. WATSON

No. 811

UNITED STATES, PETITIONER

v.

WILLIAM E. DODD, JR.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Court of Claims of the United States entered in the above-entitled cases on November 5, 1945.

OPINIONS BELOW

The opinions in the Court of Claims (R. 33–48) have not yet been officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on November 5, 1945 (R. 33, 41, 48–49). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services, and not merely to prohibit disbursing agencies from paying their salaries.

2. If so, whether Section 304 is constitutional.

3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder, the United States incurred a legal obligation to pay respondents for services rendered after November 15, 1943.

4. Was the Court of Claims presented with justiciable controversies.[1]

STATUTE INVOLVED

Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter

[1] This question is presented at the request of counsel appointed by the subcommittee of the House Committee on Appropriations pursuant to H. Res. 386, 78th Cong., 1st Sess.

made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided,* That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further,* That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

STATEMENT

In 1939 respondent Lovett was duly appointed the United States Government Secretary of the Virgin Islands. On August 26, 1943, he was duly appointed Executive Assistant to the Governor of the Virgin Islands and entered on duty as such on October 12, 1943 (Lovett Fdgs. 2, 4; R. 19–20, 33).[3]

[3] The court below considered and disposed of these three cases together, but made separate findings of fact with respect to each of the three respondents and numbered the findings relating to each respondent in a separate series.

On November 16, 1941, respondent Watson was duly appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission (Watson Fdg. 2; R. 24, 33). On December 1, 1941, respondent Dodd was duly appointed Editorial Assistant, Foreign Broadcast Intelligence Service, Federal Communications Commission (Dodd Fdg. 2; R. 29, 34).

On February 9, 1943, the United States House of Representatives (78th Cong., 1st Sess.) adopted H. Res. 105, pursuant to which a special subcommittee of the Committee on Appropriations was appointed to investigate charges that "certain persons" in the executive branch of the Government were "unfit to continue in such employment" (Fdgs. 5; R. 20–21, 25–27, 30–31; 89 Cong. Rec. 734, 742). Following such investigation, the subcommittee reported to the Committee on Appropriations that respondents were "unfit" to be Government employees. The Committee approved these findings. On May 14, 1943, it submitted its report (H. Rep. No. 448, 78th Cong., 1st Sess.) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943, which, with modifications not here material, was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra* (Fdgs. 5, 6;

Findings by number preceded by the name of a respondent refer to the designated respondent only; findings by number not designated by the name of a particular respondent refer to all the respondents.

R. 21–22, 26–28, 30–32).[3] The President did not appoint any of the respondents pursuant to the provision made for such appointment in Section 304 (Fdgs. 6; R. 22, 28, 31–32).

Respondent Lovett continued in the office of Executive Assistant to the Governor of the Virgin Islands until March 13, 1944 (Lovett Fdg. 3; R. 19); respondents Watson and Dodd continued in their respective positions with the Federal Communications Commission until November 21, 1943 (Watson Fdgs. 3, 7, Dodd Fdgs. 3, 7; R. 24, 28–29, 32). Because of the provisions of Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra*, "and the fact that the President did not appoint [them] thereunder", none of the respondents received any salary or other compensation for services rendered by him after November 15, 1943 (Lovett Fdgs. 7–10, Watson Fdgs. 7–8, Dodd Fdgs. 7–8; R. 22–24, 28–29, 32–33). On December 3, 1943, the respondents filed their respective petitions in the Court of Claims and on September 27, 1944,

[3] President Roosevelt signed the Act on July 12, 1943. On September 14, 1943, in a message to the Congress, President Roosevelt stated that he had felt obliged to approve the Act because it appropriated funds essential to the conduct of the activities of the Government during the recess of the Congress, but that he had done so reluctantly because he believed Section 304 to be "not only unwise and discriminatory, but unconstitutional" both as a bill of attainder and as an unwarranted encroachment upon the authority of both the executive and judicial branches under the Constitution. 89 Cong. Rec. 7521.

respondent Lovett filed his amended petition (R. 1–17). Respondents Watson and Dodd sought to recover the amounts of their salaries for the period from November 16 to November 21, 1943, inclusive (R. 7, 11–13, 17); respondent Lovett, the amount of his salary for the period from November 16, 1943, to March 13, 1944, inclusive (R. 1, 6–7).

On December 6, 1943, the Attorney General advised the Congress that he concurred in the President's opinion (*supra*, fn. 3) that Section 304 of the Urgent Deficiency Appropriation Act, 1943, was unconstitutional, that he found it "impossible to advocate with conviction the views of the Congress", and that in the circumstances he felt "that the Congress should be afforded an opportunity to be represented by their own counsel". H. Rep. No. 1117, 78th Cong., 2d Sess., pp. 3–4; S. Rep. No. 724, 78th Cong., 2d Sess., p. 3.

On December 18, 1943, H. Res. 386 was agreed to by the House (78th Cong., 1st Sess.), authorizing the special subcommittee appointed by the Committee on Appropriations pursuant to H. Res. 105 "to appoint counsel to represent the United States in the Court of Claims and in any appellate proceedings resulting therefrom in the actions * * * in said Court" theretofore filed by respondents Lovett, Watson, and Dodd. 89 Cong. Rec. 10882. Counsel thus appointed by the special subcommittee appeared in the Court of Claims as *amici curiae* (R. 34) and contended, *inter alia*, in

opposition to the contentions of respondents, that Section 304 was a valid exercise of the constitutional power of Congress; that Congress in enacting it exercised its plenary powers of appropriation; that it was neither an encroachment upon the powers of the executive branch nor a bill of attainder; and that it did not deny respondents due process of law.[4] The petitioner, in a brief filed by the Department of Justice, took the position that Section 304 is an unconstitutional infringement of the executive power of removal and is probably also unconstitutional as a bill of attainder.

The court below, all five members participating, was unanimous in entering judgments for the respondents (R. 33, 41–42, 44, 48–49), finding that each could recover the amount of money which had been withheld from him, in payment for the services rendered by him after November 15, 1943, "solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder" (Lovett Fdg. 10, Watson Fdg. 8, Dodd Fdg. 8; R. 24, 29, 33). Chief Justice Whaley, in delivering "the opinion of the Court" (R. 33), in

[4] Special Counsel also contended that the Court of Claims lacked jurisdiction; that the claims were not of a justiciable character; and that if the court passed on the question of the constitutionality of Section 304, it must also necessarily determine whether that Section was separable from the remainder of the Act of which it was a part.

which Judge Littleton concurred (R. 41),[5] did not pass on the questions which had been raised as to the constitutionality of Section 304 and held that Section 304 had not terminated the respondents' services (R. 36–37, 40–41), but had merely prohibited the disbursing agencies from paying their salaries (R. 37–38); that such prohibition, however, did not extend to the Court of Claims (R. 39); and that, since Section 304 had not destroyed the obligation to pay for services rendered by the respondents after November 15, 1943, they were entitled to judgment (R. 40–41).

The majority of the court below, however, in three separate opinions (R. 41, 42, 44), held that Section 304 was unconstitutional. Judges Whitaker and Madden held that it was a bill of attainder (R. 41–42, 46). Judge Whitaker found it "unnecessary to consider the other constitutional objections to it" (R. 42); Judge Madden held further that Section 304 was violative of the Fifth Amendment (R. 46–47). Judge Jones held that "Section 304 in making a permanent ban on the rights and privileges of the [respondents] exceeds the authority delegated to the Congress by the Constitution" (R. 44).

REASONS FOR GRANTING THE WRIT

It is submitted that "the opinion of the court" below was in error in holding that Section 304

[5] It is not clear whether or not Judge Madden also concurred in "the opinion of the court," as distinct from the result reached. See R. 44.

of the Urgent Deficiency Appropriation Act, 1943, had not terminated the respondents' services but had merely prohibited the disbursing agencies from paying their salaries. In our opinion, therefore, the question as to the constitutionality of Section 304 must be decided. Although this Department is still of the view that the Section is unconstitutional, we have been requested by the Special Counsel appointed by the subcommittee of the House Committee on Appropriations to file this petition for certiorari so that the question as to the liability of the United States may be brought to this Court. We agree with Special Counsel that the questions presented are worthy of review on certiorari. Authoritative decision by this Court of the questions presented is of the highest importance to the Government of the United States, and particularly to its executive and legislative branches.

1. Section 304, in terms merely a denial of an appropriation for a particular purpose, must be construed in accordance with the actual intention of Congress. *United States* v. *Mitchell*, 109 U. S. 146; *United States* v. *Langston*, 118 U. S. 389; *Dunwoody* v. *United States*, 143 U. S. 578; *United States* v. *Vulte*, 233 U. S. 509; *United States* v. *Dickerson*, 310 U. S. 554; *Markham et al* v. *Cabell*, No. 76, this Term, decided December 10, 1945. It is patent that Congress by Section 304 intended to destroy the substantive obligation to pay respondents their salaries by removing them from

office, and not merely to prohibit the discharge of that obligation. Section 304 not only forbids the use of any appropriation for the payment of respondents' compensation, but also provides a particular means by which respondents could have been appointed to their positions so as to entitle them to compensation out of congressional appropriations, namely, by appointment by the President, by and with the advice and consent of the Senate, prior to November 15, 1943. Such a provision for appointment would be superfluous if the respondents were not, by Section 304, being ousted from their positions. Nor does Section 304 limit its prohibition as to the use of appropriations to appropriations made available by the Act of which it is a part or which had prior to its passage been made available. It also provides that no appropriation "which is hereafter" made available "under or pursuant to any other Act" can be used for the purpose of paying respondents' compensation.[6] Such language cer-

[6] In "the opinion of the court" below, Chief Justice Whaley and Judge Littleton indicated (R. 35) that the validity of this provision of Section 304, forbidding the use of future appropriations to pay respondents' compensation, was at least questionable, that it was not, however, before them for decision, and that its invalidity did not vitiate the entire section. Regardless of what the effect of the invalidity of the future appropriations provision may be upon the section as a whole, it seems clear that the section as a whole, even its more obviously invalid portions, may be examined for the purpose of determining the congressional intent in enacting the section.

tainly is not consistent with a desire merely to limit the purposes for which appropriated funds may be used. Furthermore, since the mere withholding of an appropriation without abolishing respondents' offices or removing respondents from their offices would not affect the respondents' legal right to their salaries, enforceable in court (*United States* v. *Langston*, 118 U. S. 389), it is not to be believed that Congress, in enacting Section 304, was simply refusing to appropriate that which it knew was due to respondents. See *Belknap* v. *United States*, 150 U. S. 588, 595.

Moreover, the legislative history of Section 304 is replete with evidence that the real purpose of the Congress was to remove respondents from office. Cf. *United States* v. *Dickerson, supra.* H. Res. 105, 89 Cong. Rec. 734, 742, authorized a special subcommittee appointed by the Chairman of the Committee on Appropriations to examine into charges that certain employes in the executive branch "are unfit to continue in such employment" because of their association with organizations "'subversive to the Government of the United States". The special subcommittee, in reporting to the Committee on Appropriations, stated, with respect to respondent Lovett, its

> * * * conviction that this official is unfit to hold a position of trust with this Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are sub-

versive to the Government of the United States.

If this official is continued in office he will be in position to propagate his subversive philosophies through control of Government money spent in the Virgin Islands and otherwise influence the native mind through his Government position. (H. Rep. 448, 78th Cong., 1st Sess., p. 12.)

The subcommittee concluded that respondent Lovett "is unfit to continue in the employment of the United States" (*Ibid.*). Similar conclusions were reached by the special subcommittee with respect to respondents Watson and Dodd (*Id.*, pp. 5–7). The Committee on Appropriations approved the findings of its special subcommittee (*Id.*, p. 1) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943 (*Id.*, p. 2), which, with modifications not here material, was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943.

It is thus clear that the congressional proponents of Section 304 considered respondents unfit to hold public office because of their "subversive" activities. If Section 304 is construed as merely withholding appropriations for the payment of respondents' salaries while permitting them to hold their respective offices, it will not remedy the situation to which it was directed. It would then permit persons found to be unfit for government employment by reason of their "subversive"

activities to continue in government employment and there be in a position to "propagate" their philosophies and to subvert the Government instead of serving it. Such a paradoxical intent cannot be imputed to the Congress.

It is noteworthy that the House of Representatives, in adopting H. Res. 105, not only contemplated the enactment of legislation such as Section 304, but also contemplated its enactment as part of an appropriation bill, and, indeed, contemplated that such legislation would have the effect of "changing existing law" and therefore could not, under Clause 2 of House Rule XXI, be made part of a general appropriation bill. To overcome this obstacle and thus permit the enactment in an appropriation bill of legislation dealing with matters not germane to appropriations, the ousting of respondents from their positions, H. Res. 105 provided:

> Any legislation approved by the committee as a result of this resolution may be incorporated in any general or special appropriation measure emanating from such committee or may be offered as a committee amendment to any such measure notwithstanding the provisions of clause 2 of rule XXI. (89 Cong. Rec. 734.)

And it may be noted further that the Committee on Appropriations, in recommending the inclusion of Section 304 in the bill which became the Urgent Deficiency Appropriation Act, 1943, ad-

verted to this very authority to include in an appropriation bill matter which would otherwise have been out of order under Clause 2 of House Rule XXI (H. Rep. 448, 78th Cong., 1st Sess., p. 2). In these circumstances, the congressional intent to do more than cut off appropriations for the payment of respondents' salaries cannot be questioned.

2. It is submitted, therefore, that the rights of respondents to recover compensation for their services rendered after November 15, 1943, cannot be adjudicated without reaching the question of the constitutionality of Section 304. This is a question of grave importance. In his message to the Congress (*supra*, fn. 3) following his reluctant signing of the Urgent Deficiency Appropriation Act, 1943, President Roosevelt stated he believed Section 304 to be "not only unwise and discriminatory, but unconstitutional". 89 Cong. Rec. 7521. He stated further that it was an "unwarranted encroachment upon the authority of both the executive and judicial branches under our Constitution. It is not, in my judgment, binding upon them." *Ibid.* Consistently with this opinion of the Chief Executive, and agreeing with it as a matter of law, the Department of Justice took the position in the court below that Section 304 unconstitutionally infringed the executive power of removal and was probably also unconstitutional as a bill of attainder (*supra*, p. 7). Counsel, appointed pursuant to H. Res.

386) by the special subcommittee of the Committee on Appropriations, sought to sustain the constitutionality of Section 304 (*supra*, p. 7). While the court below was unanimous in awarding judgments to the respondents (*supra*, p. 7), the four opinions filed in that court (R. 33–48) indicate wide divergences among the members of the court as to the basis for these awards (*supra*, pp. 7–8). Indeed, we are advised that the special subcommittee of the House Committee on Appropriations is concerned over the indecisive effect of the divergent opinions below and is reluctant to recommend the appropriation of funds necessary to pay the judgments entered in favor of the respondents, in the absence of a clear ruling on the question of constitutionality. The divergent views of the executive and legislative branches of the Government, as well as the divergent opinions filed in the court below, even by the majority of the court who agreed as to the unconstitutionality of Section 304, make it important that this Court decide the issues presented.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946